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FAIR ISAAC CORPORATION,
PLAINTIFF,
VS.
FEDERAL INSURANCE COMPANY
and ACE AMERICAN INSURANCE
COMPANY,
DEFENDANTS.

VIDEOTAPED DEPOSITION OF
BROOKS HILLIARD

5

Taken June 19, 2019 By Brandi Bigalke, RPR

Fair Isaac Corporation vs. Federal Insurance Company, et al.

<p>1 regard to insurance companies would be with 2 respect to implementing software and hardware 3 solutions for them?</p> <p>4 A. That's not exactly what I said. It 5 would be with respect to surveying their 6 information technology needs, finding systems 7 that met those needs, evaluating those systems 8 with my clients, helping my clients make a 9 determination, and then following through to 10 the -- following through the process of the 11 implementation which would generally have been 12 done by the supplier of the systems. I would not 13 have done the implementation myself, but I would 14 have monitored that process from beginning to 15 end.</p> <p>16 Q. But you do not recall as you sit 17 here today any occasion in which you have been 18 retained as an expert witness with respect to the 19 insurance industry; is that fair?</p> <p>20 A. As I sit here today, I don't recall 21 any.</p> <p>22 Q. What would you need to do to 23 refresh your recollection about that? Do you 24 list anywhere all the cases where you have been 25 retained as an expert witness?</p> <p style="text-align: right;">Page 13</p>	<p>1 It could be -- many of the cases 2 are issues between -- regarding the performance 3 or functionality or implementation of computer 4 systems. There are intellectual property cases. 5 There are software licensing or contracting 6 cases, and a few other random.</p> <p>7 So it tells the type. Keep a 8 record of the state it was in. Those are the 9 columns I recall.</p> <p>10 Q. Can you turn to your report, 11 Exhibit 500. Could you turn to page 3. Could I 12 grab your report for a second.</p> <p>13 A. (Witness complying.)</p> <p>14 Q. Thank you.</p> <p>15 On the top of page 3 you reference 16 the fact that your work has included the 17 selection, implementation, and ongoing support 18 for business information technology applications. 19 Did I read that accurately?</p> <p>20 A. Yes.</p> <p>21 Q. Is it fair to say that the majority 22 of your experience related to software has 23 related to implementation and not on software 24 licensing issues?</p> <p>25 A. Almost all of those engagements</p> <p style="text-align: right;">Page 15</p>
<p>1 A. I do have a list on my office 2 computer. It doesn't necessarily have the 3 industry for each -- involving each of the 4 matters, so I'd have to -- I might have to go 5 back and look at some of the information I've 6 retained, and for some things it may go back 7 several years to refresh my memory of the 8 industry.</p> <p>9 In most cases if I look at the 10 litigants, I would remember the industry, but I 11 can't say necessarily in every instance.</p> <p>12 Q. Could you describe this list that 13 you've just referenced?</p> <p>14 A. It's a computerized spreadsheet.</p> <p>15 Q. And what are rows and columns and 16 categories on that spreadsheet?</p> <p>17 A. Client number, some sort of a 18 designation of the case. In most cases it would 19 be the parties to the case, although perhaps some 20 of the earlier ones it might just be the law firm 21 that was my client. It tells whether I testified 22 in the case, whether the testimony was deposition 23 testimony, trial testimony, arbitration 24 testimony, what type of case it was. It could be 25 e-discover. I've done some e-discovery cases.</p> <p style="text-align: right;">Page 14</p>	<p>1 involve not just the selection of the system but 2 the negotiation of the software license service, 3 maintenance license -- service and maintenance 4 agreement, in some cases hardware contracts.</p> <p>5 So I point out there are some 200 6 of those engagements. I would say that in a 7 hundred -- well over 150 of them I was involved 8 in the review of the contract, the contract 9 negotiation with my client's in-house counsel or 10 law firm.</p> <p>11 Q. Have you worked as an expert 12 witness in other cases involving the 13 interpretation of a software license agreement?</p> <p>14 A. I've worked in a good number of 15 cases. Somewhere between 30 and 50 where the 16 primary issues dealt with software contracts. 17 And I don't believe it's the role of the expert 18 to interpret the meaning of a contract, and so in 19 most of those cases -- I think that's the role of 20 the Court or the jury.</p> <p>21 In most of those cases, my focus 22 has been on providing information that would be 23 helpful to the Court or to the jury in their 24 determination of what the meaning of the contract 25 was. So that's a substantial portion of the</p> <p style="text-align: right;">Page 16</p>

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1 cases I've been involved in.

2 Q. So it's your belief or

3 understanding that it's not the purpose of an
4 expert witness to interpret the meaning of a
5 contract?

6 **A. In most cases the Court is looking**
7 to the expert to provide assistance to the finder
8 of fact in determining the meaning of the
9 contract rather than producing the expert's
10 opinion of what the meaning is.

11 Q. In response to my question, do you
12 believe or understand that it is not the purpose
13 of an expert witness to interpret the meaning of
14 a contract?

15 **A. By interpret you mean reach an**
16 opinion as to what the meaning is?

17 Is that what you're asking?

18 Q. You understand what the word
19 "interpret" means, don't you?

20 **A. Well, it has multiple connotations.**

21 Q. Well --

22 **A. So I'm trying to get some**
23 clarification.

24 Q. How would you define the meaning of
25 the word "interpret"?

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1 **A. If one defined -- well, I would**
2 look at multiple ways of doing that. One way
3 would be interpret terms of art and issues within
4 the contract relating to the contract and to the
5 events that the contract covers that would be
6 helpful to determine the meaning of the contract.
7 The other way of looking at it
8 would be stating an opinion as to the meaning of
9 the contract.

10 My engagements have been in the
11 former area rather than trying to express an
12 opinion as to what the contract means.

13 Q. So you've given two different
14 definitions of interpret just now; is that right?

15 **A. Two different connotations I guess.**

16 Q. Okay. Using the first connotation,
17 would you agree that it's your belief or
18 understanding that it is not the purpose of an
19 expert witness to interpret the meaning of the
20 contract?

21 **A. I would state it differently.**

22 MR. HINDERAKER: I was just going
23 to say we're not offering Mr. Hilliard as a legal
24 expert, or offering legal opinions.

25 THE WITNESS: And I would not state

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1 it the way you stated it in your question.

2 BY MR. FLEMING:

3 Q. How would you state it?

4 **A. I would state -- could we repeat**
5 the question, please.

6 (The requested portion was read
7 back by the court reporter.)

8 THE WITNESS: And the way I would
9 state it would be that it is the purpose of the
10 expert witness to assist the finder of fact in
11 determining the meaning of the contract.

12 BY MR. FLEMING:

13 Q. Okay. And I'm asking you a
14 different question. I'd like an answer to my
15 question.

16 **A. Sure.**

17 Q. Do you agree --

18 **A. Sorry if I'm not being responsive.**

19 Q. Do you agree or understand that it
20 is not the purpose of an expert witness to
21 interpret the meaning of the contract?

22 MR. HINDERAKER: Same objection;
23 asked and answered, and now we've already
24 clarified the vagueness of it. So object as
25 vague.

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1 THE WITNESS: I've tried to --
2 rather than state it as a negative, I've tried to
3 state what I believe -- what I understand my role
4 as an expert is rather than what it is not. I'm
5 having difficulty responding to your question as
6 to what it is not.

7 And if we use my first definition
8 of interpret, which I think was the preamble to
9 your question, if I recall correctly, then that
10 is the purpose of an expert.

11 BY MR. FLEMING:

12 Q. Have you responded?

13 **A. If you'd like I could say it's not**
14 the second definition of interpret that I -- or
15 second connotation of interpret that I gave.

16 Q. And do you understand that in your
17 expert report you have not -- well, let me ask
18 that differently.

19 Have you interpreted the meaning of
20 the software license of the contract, and
21 specifically the software license agreement that
22 is at issue in this case -- let me rephrase that.

23 In your report do you attempt to
24 interpret the meaning of the contract at issue in
25 this case?

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<p>1 MR. HINDERAKER: I'll object to the</p> <p>2 question to the extent it's asking for a legal</p> <p>3 opinion, or to the extent it's asking</p> <p>4 Mr. Hilliard to draw the jury's conclusion in</p> <p>5 this case.</p> <p>6 THE WITNESS: Can I answer?</p> <p>7 MR. HINDERAKER: Yes.</p> <p>8 THE WITNESS: My opinions address</p> <p>9 issues that would help the finder of fact be that</p> <p>10 the Court or the jury understand the meaning of</p> <p>11 the contract. My opinions are not directed to</p> <p>12 telling the finder of fact what the meaning of</p> <p>13 the contract is.</p> <p>14 BY MR. FLEMING:</p> <p>15 Q. So do you have any opinions</p> <p>16 relating to the interpretation or meaning of the</p> <p>17 software license agreement in this case?</p> <p>18 A. That was not -- that's outside the</p> <p>19 scope of what I was asked to do.</p> <p>20 Q. So it's your testimony that you</p> <p>21 don't have any opinions concerning the meaning of</p> <p>22 the software license agreement or the</p> <p>23 interpretation of the software license agreement?</p> <p>24 MR. HINDERAKER: Again, to the</p> <p>25 extent the question is asking for -- suggesting</p> <p style="text-align: right;">Page 21</p>	<p>1 MR. FLEMING: Okay. And I'm not</p> <p>2 asking you to substitute that, I'm asking for a</p> <p>3 response to my question.</p> <p>4 Could you read the question again,</p> <p>5 please.</p> <p>6 (The requested portion was read</p> <p>7 back by the court reporter.)</p> <p>8 MR. HINDERAKER: Same objections</p> <p>9 regarding Mr. Hilliard is not a legal expert.</p> <p>10 Same objections regarding asked and answered.</p> <p>11 THE WITNESS: Can you clarify for</p> <p>12 me what it is -- how I should understand the word</p> <p>13 "interpret" or "interpretation," please.</p> <p>14 BY MR. FLEMING:</p> <p>15 Q. So earlier today you gave two</p> <p>16 different connotations to that word.</p> <p>17 Do you recall that?</p> <p>18 A. Yes.</p> <p>19 Q. Using the first connotation.</p> <p>20 A. The first connotation would be</p> <p>21 assist -- providing assistance as to what is in</p> <p>22 the contract and how issues or phrases in the</p> <p>23 contract should be or are customarily understood</p> <p>24 within the industry, the computer industry, in a</p> <p>25 way that would be helpful to the finder of fact,</p> <p style="text-align: right;">Page 23</p>
<p>1 Mr. Hilliard is here as a legal witness, he's</p> <p>2 not. The report, however, speaks for itself in</p> <p>3 terms of opinions that he expresses regarding the</p> <p>4 contract.</p> <p>5 I don't know what the trick is of</p> <p>6 the question.</p> <p>7 THE WITNESS: The vagueness of the</p> <p>8 word "interpret" is what I'm having difficulty</p> <p>9 with. I am not, and my opinions do not address</p> <p>10 the meaning of the -- of what the contract says</p> <p>11 or the meaning of the contract.</p> <p>12 My opinions address issues that are</p> <p>13 designed to assist the finder of fact in making</p> <p>14 its determination of the meaning.</p> <p>15 BY MR. FLEMING:</p> <p>16 Q. So it would be fair to say that you</p> <p>17 do not have any opinions concerning the</p> <p>18 appropriate interpretation of the contract at</p> <p>19 issue in this case?</p> <p>20 MR. HINDERAKER: Asked and</p> <p>21 answered, misstates his earlier testimony.</p> <p>22 THE WITNESS: If you substitute the</p> <p>23 word "meaning" for "interpretation," which I</p> <p>24 think is a clearer word, then the answer would be</p> <p>25 correct.</p> <p style="text-align: right;">Page 22</p>	<p>1 using that definition of interpretation, that is</p> <p>2 what my report addresses.</p> <p>3 Q. If you were to use the second</p> <p>4 connotation of that word "interpret" that you</p> <p>5 have provided, how would you respond to the</p> <p>6 question?</p> <p>7 A. The second connotation would be</p> <p>8 interpret means having an opinion as to the</p> <p>9 meaning of the contract. And my report does</p> <p>10 not -- my opinions do not address the meaning of</p> <p>11 the contract or portions of the contract.</p> <p>12 Q. Are you a member of any</p> <p>13 professional groups dedicated to licensing such</p> <p>14 as the Licensing Executives Society?</p> <p>15 A. No.</p> <p>16 Q. Do you have any degrees or</p> <p>17 qualifications relating to licensing?</p> <p>18 A. I have qualifications relating to</p> <p>19 licensing.</p> <p>20 Q. Do you have any degrees related to</p> <p>21 licensing?</p> <p>22 A. Not specifically, no.</p> <p>23 Q. Do you have in general a degree</p> <p>24 relating to licensing?</p> <p>25 A. I have an MBA degree.</p> <p style="text-align: right;">Page 24</p>

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1 Q. In licensing?
2 MR. HINDERAKER: That wasn't --
3 objection; argumentative. Not the question.
4 THE WITNESS: I have an MBA degree,
5 and as part of my MBA degree I studied a number
6 of business issues, including contract-related
7 issues. That wasn't the focus of my MBA degree.
8 BY MR. FLEMING:
9 Q. What was the focus?
10 A. **My specialization was marketing.**
11 Q. So you would agree that you do not
12 have a degree relating to licensing?
13 A. **I don't have a law degree, if**
14 **that's what you're asking. I have an MBA degree**
15 **that -- which is related, but is not specific to**
16 **licensing.**
17 Q. And when you say your MBA degree is
18 related to licensing, in fact, the focus of your
19 MBA degree was in marketing, right?
20 A. **The MBA degree covered all aspects**
21 **of business. You have to choose an area to do an**
22 **MBA thesis, and the area in which I did my thesis**
23 **was marketing.**
24 But in studying for my MBA degree I
25 covered accounting, I covered marketing, I Page 25

1 covered business policy, I covered personnel
2 human relations. I covered almost every aspect
3 of business, and many of the issues I studied
4 involved legal issues. But that was not my focus
5 area, and that's not the area where I did my MBA
6 research report.
7 Q. Are you suggesting that you had
8 classes during your MBA experience relating to
9 licensing?
10 A. **I graduated Harvard Business School**
11 **in 1973. I was actually in the class of 1970,**
12 **but I spent three years between my first and**
13 **second years of my MBA program in the U.S.**
14 **military.**
15 Harvard has a particular way of
16 teaching business using case method, and the
17 cases covered all aspects of each situation. In
18 many cases legal aspects.
19 I can't quote you from the early
20 '70s or late '60s the specific cases that I had
21 that dealt with legal issues, but there were
22 cases.
23 Q. In response --
24 MR. FLEMING: Could you read my
25 question again. Page 26

1 I'd like a response to what I
2 actually asked.
3 (The requested portion was read
4 back by the court reporter.)
5 THE WITNESS: I had -- all of the
6 classes at Harvard Business School when I was
7 there, a hundred percent were case method. Some
8 of the cases had contractual issues in them.
9 Software licensing was not a major issue at the
10 time.
11 I don't recall specific cases that
12 addressed software licensing, but many of the
13 cases included legal and contractual issues that
14 had to be considered. That was not the primary
15 focus of any case that I recall.
16 BY MR. FLEMING:
17 Q. Did any of those cases involve
18 licensing issues?
19 A. **I don't specifically recall any.**
20 Q. Okay. On page 4 of your report
21 you note that you spoke in person and/or by
22 telephone with FICO employee Bill Wade; is that
23 right?
24 A. **Yes. It was by telephone actually.**
25 Q. Why did you say "and/or by Page 27

1 telephone" then?
2 A. **At the time I wrote the report, I**
3 **had that -- I had that wording in there, and I**
4 **probably should have taken out the "in person"**
5 **portion because -- but there was a compressed**
6 **time frame from the availability of the --**
7 **Dr. Kursh's report and Mr. McCarter's report.**
8 **And in that compressed time frame I neglected to**
9 **take out that wording.**
10 Q. So on how many occasions did you
11 speak with Mr. Wade?
12 A. **One or -- I think it was just one**
13 **occasion.**
14 Q. And what was the length of that
15 communication?
16 A. **45 minutes, give or take.**
17 Q. So you had just one phone call with
18 Mr. Wade, and that phone call lasted about 45
19 minutes, correct?
20 A. **That's correct.**
21 Q. Did you discuss anything with him
22 related to this case that's not included in your
23 report?
24 MR. HINDERAKER: So we're going
25 to -- let me just give a cautionary instruction Page 28

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<p>1 of foundation.</p> <p>2 THE WITNESS: I -- I never looked</p> <p>3 at that specifically. I'm not prepared to answer</p> <p>4 that. It's not something that I looked at. It</p> <p>5 wasn't within the scope of what I looked at, or</p> <p>6 was asked to look at.</p> <p>7 BY MR. FLEMING:</p> <p>8 Q. You say that it's something you</p> <p>9 didn't take a look at, yet on pages 7 through 9</p> <p>10 of your report you're giving opinions relating to</p> <p>11 the license grant provided by the software</p> <p>12 license agreement, right?</p> <p>13 A. The only issue I looked at there</p> <p>14 was the territory issue. I didn't look at -- in</p> <p>15 terms of the different versions of the license</p> <p>16 agreement from -- that were negotiated.</p> <p>17 Q. The territory issue, where does it</p> <p>18 say anything about territory in pages 7 through</p> <p>19 9, Section A1?</p> <p>20 A. What I'm telling you is I didn't</p> <p>21 look at earlier versions of -- that were not</p> <p>22 signed versions of the license agreement with</p> <p>23 respect to the issues discussed from the bottom</p> <p>24 of page 7 through the top of page 9.</p> <p>25 Q. Okay. Let me see if I understand. Page 145</p>	<p>1 A. Both validly license users and</p> <p>2 those who may or may not be validly licensed?</p> <p>3 Are you asking me to comment whether I have</p> <p>4 knowledge on both validly licensed users and</p> <p>5 others who may or may not be validly licensed?</p> <p>6 Q. I think my question is pretty</p> <p>7 clear. What is your understanding as to which</p> <p>8 entities actually use Blaze Advisor software?</p> <p>9 MR. HINDERAKER: Over? And your</p> <p>10 period of time I think was 2006 to date?</p> <p>11 MR. FLEMING: Yes.</p> <p>12 MR. HINDERAKER: Just to be clear.</p> <p>13 And my objection is outside -- my objection is</p> <p>14 lack of foundation.</p> <p>15 THE WITNESS: I'm aware of users</p> <p>16 who are Chubb & Son employees. I'm aware that</p> <p>17 there were users of the software who were</p> <p>18 employees of companies affiliated with Federal or</p> <p>19 affiliated with the pre merger Chubb Corporation.</p> <p>20 I'm aware of -- those are the ones I'm aware of.</p> <p>21 I'm not sure whether there are</p> <p>22 users of the -- well, there are -- since the</p> <p>23 merger, there are users of Chubb -- there are</p> <p>24 users of the software who are employees of Chubb,</p> <p>25 Limited who may or may not be employees of Chubb Page 147</p>
<p>1 You're not providing any opinions</p> <p>2 as to the scope of the license grant, rather your</p> <p>3 opinion just relates to the territorial issue?</p> <p>4 A. You mis --</p> <p>5 Q. Is that fair?</p> <p>6 A. No, you mischaracterized what I</p> <p>7 said.</p> <p>8 Q. All right. Well, let's look at the</p> <p>9 territory issue.</p> <p>10 A. Okay.</p> <p>11 Q. Okay. One other question before we</p> <p>12 get there.</p> <p>13 Within the defendant corporations,</p> <p>14 who do you understand actually uses the Blaze</p> <p>15 Advisor software?</p> <p>16 A. People in the Chubb & Son division</p> <p>17 of Federal.</p> <p>18 Q. And why do you believe that?</p> <p>19 A. Well, my understanding is those are</p> <p>20 the ones that are covered -- the individuals that</p> <p>21 are covered by the license.</p> <p>22 Q. And my question is different than</p> <p>23 that. Do you understand who actually uses the</p> <p>24 Blaze Advisor software and have used it since the</p> <p>25 license agreement was executed? Page 146</p>	<p>1 & Son.</p> <p>2 BY MR. FLEMING:</p> <p>3 Q. Okay. And just to go back. Could</p> <p>4 you identify any employee of Chubb & Son?</p> <p>5 A. Well, and there are also users of</p> <p>6 the development portion of the software, as</p> <p>7 opposed to end user portion who are outside</p> <p>8 consultants employed by divisions of Chubb</p> <p>9 Corporation pre merger and/or Chubb, Limited post</p> <p>10 merger.</p> <p>11 Q. And can you identify any employee</p> <p>12 of Chubb & Son at any time? One person?</p> <p>13 A. Not off the -- I've seen a lot of</p> <p>14 e-mails and I believe some of them -- to the best</p> <p>15 of my recollection some of them had sig sections,</p> <p>16 a section underneath where it says the name of</p> <p>17 the person where it identifies their position and</p> <p>18 company. And I believe some of them were Chubb &</p> <p>19 Son to the best of my recollection, but I'm not</p> <p>20 recalling that any specific employee that it said</p> <p>21 that on their e-mail or on letters or memos that</p> <p>22 were produced in this case.</p> <p>23 Q. All right. On page 10 of your</p> <p>24 report, you reference the June 26, 2006, draft of</p> <p>25 the software license agreement where the phrase Page 148</p>

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<p>1 worldwide -- worldwide was removed from the Blaze 2 license; is that right? 3 A. At the top of the page, I reference 4 a June 26 draft where the United States of 5 America was lined through and worldwide was 6 substituted. 7 And then in the following paragraph 8 I reference a June 27 draft which changes that 9 section to read, "territory with respect to the 10 installation and physical location of the Fair 11 Isaac products means the United States." 12 So a change from territory means 13 worldwide in the June 26, to territory with 14 respect to the installation and physical location 15 means the United States of America in the 16 June 27th. 17 Is that what you're asking about? 18 Q. Let me show you what's previously 19 been marked as Exhibit 312. Have you reviewed 20 this e-mail and this draft of the software 21 license agreement before? 22 A. This is an exhibit to -- whose 23 deposition is this an exhibit to? 24 Q. This is an e-mail from Jandeen 25 Boone, the same person you referenced.</p> <p>Page 149</p>	<p>1 term territory, which limits the installation and 2 physical location. 3 But taking it out of Section 2.1 4 doesn't necessarily restrict usage with the 5 same -- at least as I understand it, and I'm not 6 a lawyer. 7 But looking at it from what would 8 be my view and what I believe is normal and 9 customary, that taking it out of here would open 10 usage outside of the territory, where the 11 territory limits installation and physical 12 location. 13 Q. So you're interpreting the 14 contract? 15 A. I'm giving you my understanding of 16 what would be a normal and customary 17 understanding in the industry of what industry 18 people would look at this contract and understand 19 from it. 20 Q. So are you familiar with other FICO 21 Blaze software agreements that actually have a 22 reference to the territory in the license grant 23 section? 24 A. In the two weeks that I had to do 25 this report, I don't recall whether I saw any</p> <p>Page 151</p>
<p>1 MR. HINDERAKER: He was asking if 2 you know whose deposition this was an exhibit to. 3 MR. FLEMING: Well, I mean, it says 4 Boone deposition at the bottom of the tab -- 5 THE WITNESS: Then I have seen it 6 because -- 7 MR. FLEMING: -- I'm assuming that 8 was -- 9 THE WITNESS: -- I looked at the 10 exhibits to the Boone deposition. 11 BY MR. FLEMING: 12 Q. Okay. And do you see where on this 13 draft under the license grant, the phrase in 14 Section 2.1, "but only within the territory and" 15 is redlined out? 16 A. I see that. 17 Q. What is your understanding as to 18 why the parties would agree to remove territory 19 from the license grant if, as you say, they meant 20 to incorporate this term into the section? 21 A. The license grant says "subject to 22 the terms, conditions and limitations of this 23 agreement," and up above it says the following 24 terms of which territory is one, so the License 25 Grant 2.1 is subject to the terms including the</p> <p>Page 150</p>	<p>1 other such agreements. I may have, but I don't 2 recall having seen any other such agreements. 3 Q. Okay. So you've referenced a 4 couple of times short time period you had between 5 receiving the report and writing the report. 6 Are you saying that because that 7 posed some obstacles to you in providing the 8 report that you wanted to prepare and provide? 9 A. No. What I'm saying is from the 10 date when Dr. Kursh and Mr. McCarter's reports 11 that I was rebutting became available until the 12 date when my report was due, I had a limited 13 period of time. 14 I focused my time on the subject of 15 my opinions that are stated Opinions 1 through 5. 16 I didn't necessarily look at issues that did not 17 seem to me -- such as license agreements with 18 other FICO licensees, that didn't seem to be -- 19 to me to be relevant to rebutting Dr. Kursh's 20 opinions. 21 Q. Well, let's look at Dr. Kursh's 22 report on page 23, if you could. 23 A. I don't believe -- oh. 24 MR. HINDERAKER: Yeah, it's one -- 25 THE WITNESS: 501? Is it 501?</p> <p>Page 152</p>

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1 MR. HINDERAKER: Yeah, 501.	1 software license agreement, correct?
2 THE WITNESS: What page?	2 A. As I sit here today, I can't think
3 MR. FLEMING: Page 23.	3 of one right now, but I've certainly reviewed
4 THE WITNESS: Yes. What paragraph	4 them in the course of other expert engagements.
5 are we looking at?	5 As background material, I don't know necessarily
6 BY MR. FLEMING:	6 that I testified about them.
7 Q. Do you see paragraph 74?	7 Q. What significance would you give to
8 A. Yes.	8 the fact that FICO had other license agreements
9 Q. Can you read paragraph 74 out loud.	9 involving Blaze which did have territory
10 A. "Other license agreements executed	10 provisions in the license grant itself?
11 between FICO and its licensees also support	11 MR. HINDERAKER: Object to the
12 Mr. Walch's assumption by referring to territory	12 question as argumentative, misstates the record.
13 within their license grant sections."	13 THE WITNESS: I haven't looked at
14 Q. Okay. Given that Mr. Kursh	14 all of the factors related to that, and my
15 referred to other license agreements executed	15 opinion doesn't address that issue.
16 between FICO and its licensees that had -- that	16 I'm not really able or prepared to
17 refer to territory within their license grant	17 give you an answer or a conclusion to that
18 sections, why didn't you review the FICO	18 question as we sit here today, and wouldn't be
19 agreements involving Blaze that had such	19 without further study specifically directed to
20 provisions?	20 that question.
21 A. I wasn't rebutting that particular	21 BY MR. FLEMING:
22 point. If you look at my report, my opinion is	22 Q. On page 7 of your report in
23 that the licensing limitations in the license	23 referencing Dr. Kursh's opinions relating to the
24 agreement are comparable to the limitations	24 license scope, the termination clause and audit
25 customarily found in the license agreements of	25 rights, you state that his interpretation of
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1 other commercial software providers.	1 these provisions is contrary to the normal and
2 FICO applied these limitations in a	2 customary way the provisions are commonly
3 manner that is consistent with the normal customs	3 understood and applied in the commercial software
4 and practices of the commercial software	4 industry, correct?
5 industry.	5 A. Yes.
6 Dr. Kursh's Paragraph 74 isn't	6 Q. So you have an interpretation of
7 necessarily relevant to that opinion.	7 the license agreement that's contrary to the ones
8 Q. Have you ever worked with a global	8 that Dr. Kursh provided, correct?
9 software license agreement before?	9 A. What I'm saying is Dr. Kursh's
10 A. By worked -- by "worked with" do	10 interpretation is not normal and customary in my
11 you mean reviewed or been involved in	11 view based on my experience, and I've supported
12 negotiating?	12 that with others, specifically Landy and Classen,
13 Q. Either.	13 who take the same view. So it's not my opinion
14 A. I've certainly reviewed them, yes.	14 alone.
15 Q. Have you ever testified as an	15 But it's based on my understanding
16 expert witness relating to global software	16 of Kursh's interpretation being out of -- out of
17 license agreements?	17 step. Not normal and customary.
18 A. I believe I have but I can't -- I	18 Q. So your interpretation of the
19 can't recall specifically off the top of my head.	19 license agreement provisions relating to license
20 Q. As you -- I didn't mean to	20 scope, termination clause and audit rights is
21 interrupt you.	21 contrary to Dr. Kursh's interpretation of those
22 A. A specific one.	22 provisions; is that correct?
23 Q. So as you sit here today, you can't	23 A. That's not exactly what I said.
24 identify any prior case in which you've testified	24 What I --
25 as an expert witness relating to a global	25 Q. Just to be clear, I'm not stating
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<p>1 the table on 2 -- on Bates 2118. This is a</p> <p>2 pretty strange document.</p> <p>3 BY MR. FLEMING:</p> <p>4 Q. Does Amendment 2 make any reference</p> <p>5 to a territorial limitation?</p> <p>6 A. Yes.</p> <p>7 Q. Where does it say territorial</p> <p>8 limitation?</p> <p>9 A. It says, "Subject to and in</p> <p>10 accordance with the provisions of the agreement,"</p> <p>11 and the agreement is the agreement beginning on</p> <p>12 page 208 which has the territorial limitation.</p> <p>13 Q. Where are you reading from?</p> <p>14 A. I'm reading from page Bates 227,</p> <p>15 page 2 of 3 of Amendment 2 where it says, "For</p> <p>16 purposes of this amendment to the Enterprise Wide</p> <p>17 License shall mean the client and its affiliates</p> <p>18 may use the Fair Isaac product for their internal</p> <p>19 business purposes with no limitation on the</p> <p>20 number of seats or CPUs, subject to and in</p> <p>21 accordance with all the provisions of the</p> <p>22 agreement."</p> <p>23 That's what I'm referring to.</p> <p>24 MR. HINDERAKER: Is this a time for</p> <p>25 a break, Terry?</p> <p style="text-align: right;">Page 169</p>	<p>1 previous licenses shall be terminated and</p> <p>2 superceded," correct?</p> <p>3 A. That's the preamble to the table.</p> <p>4 The licenses are the licenses to the software</p> <p>5 products enumerated in the table that immediately</p> <p>6 follows that, which are different in some</p> <p>7 respects to those enumerated on 2118 and 218.</p> <p>8 MR. FLEMING: All right. Why don't</p> <p>9 we take a break.</p> <p>10 THE VIDEO OPERATOR: Going off the</p> <p>11 record. The time is 1:45 p.m.</p> <p>12 (Thereupon, a break was taken, and</p> <p>13 then the proceedings continued as follows:)</p> <p>14 THE VIDEO OPERATOR: We're back on</p> <p>15 the record. The time is 1:58 p.m.</p> <p>16 BY MR. FLEMING:</p> <p>17 Q. Mr. Hilliard, let's look at your</p> <p>18 fifth opinion that starts on page 30 of your</p> <p>19 report and you state that, "Mr. McCarter fails to</p> <p>20 support his contention that Blaze Advisor has</p> <p>21 minimal value to Federal because it is industry</p> <p>22 agnostic, easily replaceable and only one of many</p> <p>23 technologies that Federal employs to operate its</p> <p>24 insurance business. The evidence shows that</p> <p>25 FICO's Blaze provided critical capability,</p> <p style="text-align: right;">Page 171</p>
<p>1 MR. FLEMING: Yeah, I'll be done in</p> <p>2 a second.</p> <p>3 BY MR. FLEMING:</p> <p>4 Q. With your interpretation of the</p> <p>5 agreement meaning the initial agreement, the</p> <p>6 First Amendment and the Second Amendment, right?</p> <p>7 A. It's my belief that that's what</p> <p>8 that refers to.</p> <p>9 Q. Because it's defined on the first</p> <p>10 page of Amendment 2, correct?</p> <p>11 A. Yes.</p> <p>12 Q. Okay. And finally, when it says in</p> <p>13 Section 1, "all previous licenses granted to</p> <p>14 client under the agreement shall be terminated</p> <p>15 and superceded by the license," quote, is it your</p> <p>16 interpretation that that refers only to the graph</p> <p>17 or matrix on the First Amendment?</p> <p>18 A. It's the table on Bates 218, I'm</p> <p>19 reading that to refer to the table on 226</p> <p>20 supersedes the table on 2118 and/or the table on</p> <p>21 218 because those are the tables that specify</p> <p>22 what the licenses are for.</p> <p>23 Q. Even though that phrase that we</p> <p>24 just read, the second full sentence, Paragraph 1,</p> <p>25 doesn't refer to a table but rather says "all</p> <p style="text-align: right;">Page 170</p>	<p>1 contributing to Federal's revenue that Chubb &</p> <p>2 Son had not developed internally."</p> <p>3 Did I read your opinion correctly?</p> <p>4 A. I believe so, yes.</p> <p>5 Q. Now, you would agree that you are</p> <p>6 not an expert in the insurance industry, correct?</p> <p>7 A. It's not my specialty. I have</p> <p>8 significant knowledge, but it's certainly not my</p> <p>9 specialty.</p> <p>10 Q. And in response to my question, you</p> <p>11 don't consider yourself to be an expert in the</p> <p>12 insurance industry, do you?</p> <p>13 A. I don't hold myself out as an</p> <p>14 insurance industry expert. That's correct.</p> <p>15 Q. And you don't have any expertise in</p> <p>16 how insurance companies operate; is that correct?</p> <p>17 A. No.</p> <p>18 Q. Did you examine the entirety of the</p> <p>19 defendant's business operations in the course of</p> <p>20 preparing your report?</p> <p>21 A. No.</p> <p>22 Q. On page 31 of your report you</p> <p>23 reference a document that states that Federal</p> <p>24 utilizes Blaze in 15 applications.</p> <p>25 (Deposition Exhibit 511 was marked</p> <p style="text-align: right;">Page 172</p>

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<p>1 for identification.)</p> <p>2 BY MR. FLEMING:</p> <p>3 Q. Is this the document you reference</p> <p>4 on page 31 of your report?</p> <p>5 A. Yes.</p> <p>6 Q. And this was an attachment to an</p> <p>7 e-mail sent by Tamara Pawloski; is that right?</p> <p>8 A. Yes.</p> <p>9 Q. Do you know what Ms. Pawloski's</p> <p>10 position is?</p> <p>11 A. She's the VP of Software Compliance</p> <p>12 and Optimization for Global Vendor Services</p> <p>13 Organization for Chubb is what it says. That's</p> <p>14 her domain -- e-mail domain Chubb.com, and it</p> <p>15 also says Chubb above her name.</p> <p>16 Q. And do you know who prepared the</p> <p>17 attachment?</p> <p>18 A. I don't recall whether I saw who</p> <p>19 prepared it and I don't recall -- I don't recall</p> <p>20 if I saw who prepared it.</p> <p>21 Q. Do you know whether Ms. Pawloski</p> <p>22 has any IT background or experience?</p> <p>23 A. Well, if she is a VP of software</p> <p>24 compliance and optimization, she has response --</p> <p>25 IT responsibility, but I don't know her</p> <p style="text-align: right;">Page 173</p>	<p>1 Q. And what documents or what data</p> <p>2 would you request to see in addition to talking</p> <p>3 with somebody in the IT department?</p> <p>4 A. It would depend on the</p> <p>5 organization. In some cases talking to someone</p> <p>6 who was involved in it would be sufficient.</p> <p>7 Q. Well, with regard to this</p> <p>8 organization, how would you go about doing that?</p> <p>9 MR. HINDERAKER: This organization</p> <p>10 being the defendant?</p> <p>11 MR. FLEMING: Federal, yeah.</p> <p>12 MR. HINDERAKER: Objection; lack of</p> <p>13 foundation.</p> <p>14 THE WITNESS: I don't know enough</p> <p>15 about Federal to say.</p> <p>16 BY MR. FLEMING:</p> <p>17 Q. And you didn't attempt to go about</p> <p>18 verifying those facts, that is whether in fact</p> <p>19 Blaze was actually integrated into these 15</p> <p>20 applications, did you?</p> <p>21 A. I took the VP of software</p> <p>22 compliance and optimizations' word for it.</p> <p>23 Q. And my question is whether you took</p> <p>24 any other steps to verify those facts, other than</p> <p>25 reading the one e-mail and the attachment?</p> <p style="text-align: right;">Page 175</p>
<p>1 background.</p> <p>2 Q. Okay. You don't know what her</p> <p>3 actual responsibilities were though, do you?</p> <p>4 A. I just know what her title is,</p> <p>5 which would indicate some IT responsibility. But</p> <p>6 I don't -- I haven't seen her job description.</p> <p>7 Q. What technical requirements would</p> <p>8 be needed to determine whether Blaze was actually</p> <p>9 integrated into these 15 applications?</p> <p>10 A. Someone -- most likely someone</p> <p>11 on -- in the IT -- with specific IT development</p> <p>12 responsibility or someone working in the portion</p> <p>13 of Chubb with IT development or deployment</p> <p>14 responsibility.</p> <p>15 Q. And my question is really</p> <p>16 different. Not who you would talk to, but rather</p> <p>17 what would you do or ask to see in order to</p> <p>18 determine whether Blaze is actually integrated</p> <p>19 into these 15 applications?</p> <p>20 MR. HINDERAKER: Objection; beyond</p> <p>21 the scope.</p> <p>22 THE WITNESS: In my experience,</p> <p>23 you'd have to talk to someone within Chubb who</p> <p>24 was involved in these deployments.</p> <p>25 BY MR. FLEMING:</p> <p style="text-align: right;">Page 174</p>	<p>1 A. I -- I did not. I just trusted</p> <p>2 Ms. Pawloski.</p> <p>3 Q. You say in your heading A that</p> <p>4 "Blaze Advisor is integrated into core Federal</p> <p>5 operations."</p> <p>6 What do you mean by integration and</p> <p>7 core on pages 31, and you say the same on 32?</p> <p>8 A. I'm responding to Mr. McCarter's</p> <p>9 report. On page 9 of Mr. McCarter's report --</p> <p>10 well, maybe it isn't -- I may have the page</p> <p>11 number incorrect. Maybe it's Paragraph 74.</p> <p>12 MR. HINDERAKER: Do you mind if I</p> <p>13 help out by just -- I'd look at your footnote 84.</p> <p>14 THE WITNESS: Oh, I'm sorry.</p> <p>15 Paragraph 91 on page 24. You're correct.</p> <p>16 Looking at the wrong footnote.</p> <p>17 Where Mr. McCarter states, "Blaze</p> <p>18 only works when it is integrated with core</p> <p>19 insurance applications that have the required</p> <p>20 insurance functionality and service policies,"</p> <p>21 and then he identifies in Paragraph 88 above that</p> <p>22 it's used in 10 of Federal's 1500 applications.</p> <p>23 So I'm basically responding to what</p> <p>24 Mr. McCarter writes, and then I'm explaining what</p> <p>25 the term integrated -- the normal and customary</p> <p style="text-align: right;">Page 176</p>

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<p>1 understanding of the term integrated and core, 2 and with relation to business applications of 3 software. 4 BY MR. FLEMING: 5 Q. And what two paragraphs are you 6 reference, 88 and what other paragraph of 7 Mr. McCarter's report? 8 A. 91 on page 24. 9 Q. Okay. So in response to my 10 question, what do you mean when you say 11 integrated? 12 A. Well, I'm trying to -- I'm giving 13 the normal and customary industry understanding 14 of integrated since Mr. McCarter doesn't provide 15 that and I'm saying it normally means that a 16 component application, which would be Blaze 17 Advisor in this case, is linked into a host 18 application, here some insurance applications, 19 either the 10 referenced by Mr. McCarter or the 20 15 referenced by Ms. Pawloski, in a way that is 21 in the idea -- that in the ideal would allow 22 information to pass between them as if they were 23 a single unified application. 24 Now, this isn't always seamless. I 25 said -- so I said depending on how seamless, how</p>	<p>1 were represented by the Chubb VP of software 2 compliance and optimization. 3 Q. And my question is, in your 4 opinion, are you saying that the applications are 5 core or that the applications components are 6 core? 7 A. I'm saying -- 8 MR. HINDERAKER: I'm going to 9 object to that question as vague. 10 THE WITNESS: Hmm? 11 MR. HINDERAKER: I object to the 12 question, as I don't understand it, as vague. 13 THE WITNESS: Let me see if I can 14 clarify what I'm saying, is the 10 or 15 15 applications itemized by Ms. Pawloski or itemized 16 by Mr. McCarter are characterized by Mr. McCarter 17 as being core applications and he characterizes 18 them that way in Paragraph 91. 19 BY MR. FLEMING: 20 Q. Well, there are -- you agree that 21 Blaze is only used in 10 of Federal's 1500 22 applications? 23 MR. HINDERAKER: Objection; lack of 24 foundation. 25 THE WITNESS: I think what I said</p>
<p>1 close to that ideal the integration is, this 2 typically means that removal or replacement of an 3 integrated component is likely to be difficult, 4 time consuming and to risk endangering the 5 operation of the host application. 6 So I've defined what I mean by 7 integrated since Mr. -- which I think is a normal 8 and customary industry understanding, which is 9 something that Mr. McCarter did not do. 10 Q. So are you saying that the 11 applications are core or the application 12 components are core? 13 A. Well, let's look at what McCarter 14 says. And he says that Blaze only works when it 15 is integrated with core insurance applications, 16 what I refer to as the host applications where I 17 talk about integrated, that have the required 18 insurance functionality for selling and servicing 19 insurance policies. 20 So the applications would be either 21 the 10 that Mr. McCarter refers to in 22 Paragraph 88 and I think he itemizes them 23 actually in Paragraph 94 -- one, two, three, 24 four, five, six, seven, eight, nine -- yeah, he 25 itemizes them in Paragraph 94, or the 15 that</p>	<p>1 is there are two different counts and there's -- 2 and Mr. McCarter doesn't account for the 3 difference between the 15 identified by 4 Ms. Pawloski and the 10 identified in his report. 5 So I don't know whether the 10 or the 15 is 6 correct. And neither does apparently 7 Mr. McCarter. 8 BY MR. FLEMING: 9 Q. Okay. I'm asking you a different 10 question. 11 Do you agree with Mr. McCarter's 12 statement that Blaze is only used in 10 of 13 Federal's 1500 applications? 14 A. No. It may be 15 or Ms. Pawloski 15 might be wrong. 16 Q. I see. So you don't disagree that 17 there's 1500 applications, but you disagree as to 18 whether there's 10 or 15 that use Blaze, correct? 19 MR. HINDERAKER: Objection; lack of 20 foundation. 21 THE WITNESS: I don't know whether 22 the 1500 is an approximate -- I'd be surprised if 23 it was exactly 1500, so I expect that's an 24 approximation. I don't know how accurate it is. 25 BY MR. FLEMING:</p>

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1 Q. How many of those 1500 applications
2 are core applications?
3 MR. HINDERAKER: Objection; beyond
4 scope, lack of foundation.
5 THE WITNESS: I don't know the
6 answer to that and Mr. McCarter's report doesn't
7 give me any insight.
8 BY MR. FLEMING:
9 Q. How many of those applications in
10 your opinion contribute to Federal's revenues?
11 MR. HINDERAKER: Objection; scope
12 and -- outside the scope.
13 THE WITNESS: I don't know and
14 Mr. McCarter doesn't identify that.
15 BY MR. FLEMING:
16 Q. How long have you been testifying
17 as an expert witness? For how many years?
18 A. My first testimony was sometime
19 during the 1980s.
20 Q. So close to 40 years?
21 A. 35, yeah.
22 Q. And you provide four expert reports
23 a year and have testified over a hundred times as
24 an expert witness; is that right?
25 A. Yes.

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1 Q. Okay. Have you ever before
2 provided an expert opinion as to whether a
3 software application contributes to a company's
4 overall revenue?
5 A. By the way, your calculations are
6 wrong because back in the '80s and '90s, it was
7 far fewer expert engagements because I was doing
8 more consulting work and the number of expert
9 reports during that time frame was far fewer.
10 Have I ever -- but getting to your
11 question, I have often testified about whether a
12 software application was a critical application
13 to the revenue or profitability of the user, yes.
14 That's been a significant area of where I've
15 testified.
16 Q. And tell me the cases where you
17 have provided an expert opinion as to whether a
18 software application contributes to the company's
19 overall revenues.
20 A. I believe that was part of my
21 testimony in Hodell-Natco. I don't recall
22 whether I addressed that in my deposition
23 testimony in Oracle-Rimini. I don't recall about
24 QAD versus Ingersoll-Rand. I just don't recall
25 that one.

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1 Certainly the Summit-IBM case, the
2 importance of the applications to the revenue
3 and -- to the revenue was integral there. And
4 almost all of the cases related to
5 implementation -- not all, but almost all of the
6 cases related to implementation or functionality
7 of ARP business-related software, the importance
8 and the affect of the software on the operations,
9 and in most cases also on the revenue of -- of
10 the licensee was a major or significant issue.
11 And if it wasn't the revenue, it was
12 profitability. But in most cases both.
13 Q. How can you determine whether Blaze
14 contributed to Federal's revenue if you have no
15 expertise with respect to the insurance industry
16 and you did not examine the entirety of the
17 defendant's business operations?
18 A. You've mischaracterized what I said
19 earlier about having no expertise with regard to
20 the insurance industry.
21 Q. Well, you're not an expert with
22 regard to the insurance industry, correct?
23 A. I have expertise. I have had
24 multiple clients in the insurance industry, both
25 insurance companies and insurance agencies, where

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1 as a consultant I was involved in helping them
2 determine their needs, what business
3 functionality they needed in a computer system to
4 increase their revenue and profitability, and
5 whether various software applications would
6 assist them in doing so.
7 And then following through on the
8 implementation to see that the software was in
9 fact doing what it was purported to do, and
10 making the contributions to, in most cases,
11 profitability or efficiency because once the
12 implementation was complete, I didn't always stay
13 long enough to determine the revenue effects.
14 But I knew that the revenue effects were one of
15 the objectives. So I do have expertise there.
16 Q. But you don't consider yourself to
17 be an expert with respect to the insurance
18 industry?
19 A. I have enough expertise to render
20 the opinions that I rendered based on my
21 experience. That's not my specialty.
22 Q. Okay. And my question is do you
23 now consider yourself to be an expert with
24 respect to the insurance industry or not?
25 A. I have sufficient expertise to

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1 **render the opinions that I've rendered. I**
 2 haven't gone beyond where my expertise leads me.
 3 I do not characterize myself today as a
 4 specialist in insurance -- in the insurance
 5 industry with the ability to have general broad
 6 expertise applicable to all aspects.

7 But I have the expertise and I --
 8 to render the opinions that I've rendered based
 9 on the materials that I reviewed.

10 Q. Do you agree with Mr. McCarter when
 11 he says in Paragraph 89 of his report that Blaze
 12 is 1 of 45 third party technologies used by
 13 Federal?

14 **A. I didn't attempt to verify that,**
 15 and apparently neither did Mr. McCarter because
 16 he doesn't cite any sources for that. It just
 17 makes that as a statement, so there -- without
 18 sources I can't even evaluate what he said.

19 Same with the -- the 1500
 20 applications, he does cite a source there. But
 21 he doesn't cite a source for the 45 technologies,
 22 so I don't have the inside information and
 23 certainly Mr. McCarter doesn't provide anything.

24 Q. Do you believe that all of the
 25 third-party software technologies used by Federal

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 1 contribute to Federal's overall revenues?

2 **A. I have no idea.**

3 Q. Do you agree with Mr. McCarter
 4 where he says in paragraph 90 that Federal has a
 5 total of 1,545 technologies that are used to
 6 build and implement its business applications?

7 **A. Once again, he doesn't identify the**
 8 1,545 technologies and cites no source for it.

9 Q. Do you --

10 **A. I -- I have no way of verifying or**
 11 disputing it.

12 Q. Do you believe that all of the
 13 technologies that are used to build and implement
 14 Federal's business applications contribute to
 15 Federal's revenues?

16 **A. I don't have enough -- I don't know**
 17 what they are, I don't have enough information to
 18 make a determination there, and apparently
 19 neither does Mr. McCarter or he would have cited
 20 it.

21 Q. Can you quantify the contribution
 22 that Blaze makes to Federal's revenues?

23 **A. Not any further than the chairman**
 24 and CEO of Chubb does in the annual statement
 25 where he credits to the technology component of

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1 what he's doing for making Chubb competitive in
 2 the mid market and smaller market for insurance
 3 policies when the RFI that went out in 2006 said
 4 that that was the specific purpose for Chubb's
 5 licensing of Blaze in the first place.

6 So I can't do any more
 7 quantification than the chairman of Chubb does.

8 Q. The chairman of Chubb doesn't
 9 mention Blaze Advisor in the report that you're
 10 referencing, does he?

11 **A. No.**

12 Q. How many technologies -- he only
 13 references technology in general, correct?

14 **A. That's my recollection, yes.**

15 Q. How many technologies would you
 16 estimate a company of Chubb's size employs?

17 **A. Lots. I -- I can't give you a**
 18 number.

19 Q. 10, a thousand, 10,000?

20 **A. I have no basis to dispute**
 21 Mr. McCarter's estimate, nor to verify it.

22 Q. So can you quantify at all the
 23 contribution that Blaze makes to the revenue as
 24 you state in your opinion?

25 **A. I know from the RFI that the**

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1 **purpose of Blaze Advisor was to increase revenue**
 2 in the mid market and smaller market. I know
 3 that Chubb acquired the license to Blaze Advisor
 4 for that purpose.

5 I know that Chubb was not
 6 successful in that market prior to implementing
 7 Blaze Advisor, and I know that it was successful
 8 in that the chairman and CEO identified
 9 technology as being a principal reason for that
 10 in that market.

11 In terms of the -- so and the way
 12 he describes the success is exactly the way that
 13 it was the objective for Blaze Advisor was
 14 described in the RFI. I can't quantify it, but
 15 there's a direct line between the purpose of
 16 Blaze Advisor as described in the RFI in 2006 and
 17 the results identified by the chairman in 2018 I
 18 believe.

19 Q. Well, we've talked about the
 20 results as discussed by the chairman in which he
 21 did not identify Blaze but rather just
 22 technology, and you have acknowledged that there
 23 are many, many technologies utilized by Federal,
 24 correct?

25 **A. Yes.**

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<p>1 MR. FLEMING: Okay. Can you mark 2 this as the next exhibit. 3 (Deposition Exhibit 512 was marked 4 for identification.) 5 BY MR. FLEMING: 6 Q. Showing you Exhibit 512, is this 7 the RFI you were referencing? 8 A. I believe so. I identified Bates 9 57284 and this begins with 57280, and 284 is 10 actually the introduction so. And I believe 11 that's what I quoted is what's on 284. 12 Q. So your reference to the RFI was 13 actually a reference to a draft document which 14 contains red lining; is that correct? 15 A. Yes. 16 Q. Okay. So you don't even know if 17 this is the final version or if there was a final 18 version? 19 A. That's correct. 20 Q. You don't know if this document was 21 ever sent to FICO or any other company? 22 A. I didn't see a final version among 23 the Bates marked documents. It's my 24 understanding that this is the document that FICO 25 responded to and I believe there's testimony to</p>	<p>1 MR. FLEMING: I'm asking him, I'm 2 not asking you. 3 MR. HINDERAKER: And I'm not 4 answering you. I'm just asking you if you're 5 making a representation. 6 MR. FLEMING: I'm asking a question 7 that I want an answer to. 8 MR. HINDERAKER: Okay. 9 BY MR. FLEMING: 10 Q. Did somebody testify to that? 11 A. That's my recollection, yes, but I 12 don't recall. 13 Q. You don't recall whom? 14 A. Whom it was that -- who it was. 15 Q. You don't know who wrote the RFI or 16 what their expertise or position is; is that 17 right? 18 A. Well, it was Chubb & Son. I don't 19 recall if I saw a document indicating who at 20 Chubb & Son it was. 21 Q. Or what their position is? 22 A. Don't recall whether I saw a 23 document to that effect. 24 Q. And you quote this draft document 25 stating that Chubb Specialty Insurance division</p>
<p>1 that effect. I don't recall in whose deposition 2 that testimony occurred, but I believe there's 3 testimony to the effect that this is the 4 document. 5 Q. You're saying it is the final 6 document? 7 A. It is this document. I don't know 8 whether there ever was a final or whether -- I 9 don't recall whether FICO responded to this draft 10 or to a final. 11 Q. Okay. So you just don't know one 12 way or another? 13 A. Correct. 14 Q. And you don't know if the document 15 was ever actually sent to FICO or any other 16 company, correct? 17 A. I believe there's testimony to 18 that -- I believe I recall testimony to that 19 effect. 20 Q. Testimony by whom? 21 A. It may have been Mr. Wade, but I 22 don't recall for certain as we sit here today. 23 MR. HINDERAKER: Are you 24 representing there is that testimony in the 25 record?</p>	<p>1 was looking to expand into mid market and smaller 2 accounts; is that right? 3 A. Yes. 4 Q. What are the mid market and smaller 5 market accounts for Chubb Specialty Insurance? 6 A. There are accounts that are -- of 7 mid -- what business would call mid size, not 8 Fortune 500 type or equivalent. 9 Mid market is generally understood 10 to be companies in the range of several million 11 dollars in volume a year up to perhaps hundreds 12 of millions of dollars of revenue per year and 13 not including companies that have revenues of 14 billions of dollars. 15 That's -- that's the general 16 industry understanding -- 17 Q. What industry? 18 A. American business. 19 Q. Okay. Let's focus on the insurance 20 industry. 21 What are mid market and smaller 22 accounts in the insurance industry? 23 A. There was some description of that 24 as I recall in the annual report or reports, but 25 I don't recall -- I don't recall the industries.</p>

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1 related after the merger?

2 **A. Ace Limited acquired -- to the best**
3 of my knowledge, Ace Limited acquired Chubb
4 Corporation and became the parent company and
5 changed its name to Chubb Limited.

6 Regarding the sub -- the corporate
7 structure underneath Chubb Limited, that's not an
8 issue -- that's not something I've looked at.

9 Q. Now, on page 13 of your report you
10 state that "Under Section 10.8 of the Blaze
11 license, a change in control is deemed to be an
12 assignment that requires FICO's consent."

13 Is that right?

14 **A. What are you quoting?**

15 Q. On page 13.

16 **A. At the bottom of the page?**

17 Q. Uh-huh.

18 **A. I'm saying the provision states**
19 that the change of control is deemed to be an
20 assignment that requires FICO's consent. This --

21 Q. Okay. That's --

22 **A. Not that the change of control**
23 requires FICO's consent, but the assignment
24 requires FICO's consent.

25 Q. Well, the agreement provides that Page 201

1 the change of control is -- what you state is
2 "This provision states that a change of control
3 is deemed to be an assignment that requires
4 FICO's consent", correct?

5 **A. I'm paraphrasing where it says**
6 neither FICO nor Chubb & Son shall, without prior
7 written consent of the other party, assign or
8 transfer this agreement or any part thereof. In
9 the event of a change of control, or if Chubb is
10 merged with, acquired by, or acquires another
11 entity, that shall be deemed to be an assignment
12 subject to this section.

13 So what it's saying is that an
14 assignment requires FICO's consent, and that a
15 change of control is deemed to be an assignment.

16 Q. What does --

17 **A. And an assignment requires FICO's**
18 consent.

19 Q. What does a change of control
20 within the meaning of this agreement mean to you?

21 **A. I believe it's identified. I'll**
22 have to look at the agreement, and I know you
23 gave it to me as a --

24 Q. Is that it right in front of you.

25 **A. Well, actually it states here that** Page 202

1 **the change of control is not what I'm referring**

2 to necessarily, or the change of control which I
3 understand to include such things as being merged
4 with, acquired by, or acquires. And it was since
5 Chubb Corporation was acquired by Ace, that would
6 be the change of control I'm referring to here.

7 Q. Okay. And I'm asking you more
8 generally what does a change of control, as
9 stated in this agreement, mean to you?

10 MR. HINDERAKER: I'm going to
11 object to the extent it's asking for a legal
12 conclusion.

13 THE WITNESS: I'm just looking at
14 the words of the agreement in 10.8.

15 BY MR. FLEMING:

16 Q. So is this an unusual provision or
17 is it -- have you seen this type of provision in
18 other software license agreements, or is this the
19 first time you've come across this?

20 **A. I have seen it in other license**
21 agreements, and Landy refers to it and I've
22 quoted Landy on page 15 describing a change of
23 control. A very similar provision and he -- I've
24 referred to it in a couple places.

25 I think Classen also talks about Page 203

1 the same issue and I've referenced Classen on
2 page 16. And I've -- as I say, I'm relying
3 primarily on my own experience. I've seen
4 similar provisions.

5 Q. Okay. So --

6 **A. In contracts and software licenses.**

7 Q. So given all that, what is your
8 understanding of what is meant by "change of
9 control" as used in this agreement?

10 **A. In this case I'm referring to the**
11 acquisition by Ace. That's what I'm referring
12 to.

13 Q. Okay. And regardless of what
14 you're referring to, my question is what is your
15 understanding as to what is meant by "change of
16 control" in this agreement?

17 You say that you've seen it before.
18 You say that it's used in a number of other
19 agreements.

20 What's your understanding as to
21 what is meant by "change in control," or don't
22 you have an understanding?

23 **A. My understanding as it's used in**
24 this agreement is just what it says in
25 Section 10.8. Page 204

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<p>1 Q. And namely by that you mean what?</p> <p>2 A. A merger acquisition.</p> <p>3 Q. But Section 10.8 says "in the event</p> <p>4 of a change in control or if the client is merged</p> <p>5 with, acquired, or acquires another entity,"</p> <p>6 correct?</p> <p>7 A. That's what it says.</p> <p>8 Q. Okay. So my question is what is</p> <p>9 your understanding as to what is meant by change</p> <p>10 of control in this agreement, or don't you have</p> <p>11 an understanding?</p> <p>12 A. The general understanding would be</p> <p>13 new ownership because general understanding</p> <p>14 within industry would be new ownership. It's</p> <p>15 similar to what Landy and Classen say.</p> <p>16 So the belt and suspenders approach</p> <p>17 of having the "and" in the 10.8 doesn't to me</p> <p>18 make change of control any different than the --</p> <p>19 new ownership could be described in any of these</p> <p>20 ways.</p> <p>21 Q. So what is your understanding of</p> <p>22 what the phrase means that -- in Section 10.8</p> <p>23 that client shall make no expanded use of the</p> <p>24 Fair Isaac products as a result of any such event</p> <p>25 unless and until Fair Isaac provides such written</p>	<p>1 the licensor and the licensee begin discussions</p> <p>2 about what would be required for consent. An</p> <p>3 agreement is reached in the normal case. If</p> <p>4 there are issues, then there's a 30-day cure</p> <p>5 period.</p> <p>6 So during the period of time after</p> <p>7 the event and prior to the initiation of a 30-day</p> <p>8 cure period, as well as during the 30-day cure</p> <p>9 period, there can be no expansion of use. And</p> <p>10 it's normal and customary that when issues come</p> <p>11 up between licensors and licensees if there's a</p> <p>12 specified 30-day cure period, that very often</p> <p>13 those cure periods get extended if there are --</p> <p>14 further issues that need further discussion.</p> <p>15 Q. Of course section --</p> <p>16 A. And so it would be also during any</p> <p>17 expansion of 30-day cure period.</p> <p>18 Q. Of course Section 10.8 doesn't</p> <p>19 reference any 30-day period, correct?</p> <p>20 A. Well, Section 10.8 says that the</p> <p>21 consent is required, and that any attempt to</p> <p>22 assign or transfer without first obtaining such</p> <p>23 written consent will be null and void and of no</p> <p>24 affect. And that ties in with -- and the consent</p> <p>25 is required, that ties in with I believe it's 9.2</p>
<p>1 consent?</p> <p>2 A. That upon the event of a, let's say</p> <p>3 acquisition of Chubb, which is what actually</p> <p>4 happened here, that until Fair Isaac provides</p> <p>5 consent during that interim period, that the</p> <p>6 licensee is not allowed to make any expanded use</p> <p>7 during that interim period.</p> <p>8 Q. So based on that understanding, if</p> <p>9 the licensee does not engage in any expanded use,</p> <p>10 does this agreement require that consent be</p> <p>11 obtained in the event of a merger?</p> <p>12 A. Yes, because there's a deemed</p> <p>13 assignment, and that assignment requires consent.</p> <p>14 Q. So how does the provision relating</p> <p>15 to expanded use play into that?</p> <p>16 If there's a merger but no expanded</p> <p>17 use, is it your understanding that there has to</p> <p>18 be consent?</p> <p>19 A. The way this normally happen --</p> <p>20 what is normal and customary is that corporations</p> <p>21 don't hold up mergers because one of the</p> <p>22 corporations might have a software license that</p> <p>23 requires some consent.</p> <p>24 What normally happens is that same</p> <p>25 thing that began to happen in this instance, that</p>	<p>1 which deals with termination in the event of an</p> <p>2 uncured breach.</p> <p>3 So the violation would be the</p> <p>4 attempted assignment, and so that goes -- refers</p> <p>5 directly to 9.2 which does have the 30-day cure</p> <p>6 period.</p> <p>7 Q. So Section 10.8, this provision</p> <p>8 that says, "The client shall make no expanded use</p> <p>9 of the FICO product as a result of any such an</p> <p>10 event unless and until FICO provides such written</p> <p>11 consent," so what happens in your opinion in the</p> <p>12 event that there is a merger but no expanded use?</p> <p>13 MR. HINDERAKER: Objection; asked</p> <p>14 and answered.</p> <p>15 THE WITNESS: If there's a merger,</p> <p>16 there is a deemed assignment, there is to be no</p> <p>17 expanded use during the period where consent is</p> <p>18 being discussed, and in most cases granted, after</p> <p>19 discussions and negotiations. And -- but if</p> <p>20 consent is not granted, then the assignment is</p> <p>21 null and void, and that's when the termination</p> <p>22 provision comes into play.</p> <p>23 So the expanded use can't go on</p> <p>24 forever because the assignment becomes null and</p> <p>25 void, and the license is no longer effective.</p>

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1 BY MR. FLEMING:

2 Q. But what if -- what if there is no
3 expanded use, is there any need to get consent
4 under those circumstances?

5 MR. HINDERAKER: Objection; asked
6 and answered.

7 THE WITNESS: Yes, because the
8 assignment occurred without consent, which -- and
9 that assignment becomes null and void.

10 In this case the deemed assignment
11 is to Ace, and it became null and void, so the
12 software was no -- Ace is a separate company,
13 entirely different potential licensee. There is
14 no license for Ace. The license is to Chubb &
15 Son, which no longer exists as a separate entity.
16 It has been acquired, so consent is -- is
17 required for that assignment. When the consent
18 isn't received, the assignment is null and void,
19 the license goes away.

20 BY MR. FLEMING:

21 Q. So if I understand your testimony,
22 the provision in here dealing with expanded use,
23 your interpretation is that that just applies to
24 this 30-day time period where there's a
25 negotiation with regard to consent to the

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1 assignment?

2 **A. I'm just reading what the words of**
3 **provision 10.8 say --**

4 Q. And what I just said, do you
5 disagree with that or not?

6 **A. I do disagree with that.**

7 Q. And how so?

8 **A. Well, first of all, in most cases**
9 **there is no 30-day cure period because the**
10 **organizations work out the conditions for the**
11 **assignment prior to a termination -- or prior to**
12 **an initiation of a cure period. So that no**
13 **expanded use would be applicable during that**
14 **time. And in most cases, as I say, there is no**
15 **notice, there is no cure period. The ex -- there**
16 **are discussions until consent is received, and**
17 **there's no expanded use during that time frame.**

18 If there is a notice and there is a
19 cure period, then the expanded use provision
20 applies during that period as well.

21 Q. So it's your understanding that
22 there is a violation of a no-assignment
23 provision, correct?

24 **A. I'm just reading what 10.8 says.**

25 It says there's a deemed assignment -- it says

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1 that assignment cannot be done without consent,
2 that if -- when there's the acquisition, the
3 deemed assignment has occurred, it's an
4 occurrence of the deemed assignment without
5 consent. And that if that persists, then the
6 assignment is void and of no force or effect,
7 meaning -- and the assignment is of the license.
8 So if there is no assignment, the license goes
9 away.

10 Q. Okay. Just so that we're clear,
11 you're saying that there was a violation of the
12 no assignment provision under Section 10.8,
13 correct?

14 **A. It's my understanding of what**
15 **normal and customary meaning of 10.8 would have**
16 **that affect, yes.**

17 Q. Okay. So which entity assigned the
18 Blaze license to which entity? Explain what the
19 violation of the no assignment provision was
20 here.

21 **A. It was the acquisition of**
22 **Chubb & Son by Ace which automatically caused the**
23 **deemed assignment which never received consent.**

24 Q. So what is your understanding as to
25 whom Chubb & Son assigned the license to?

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1 What was the violation?

2 MR. HINDERAKER: Objection;
3 question assumes facts not in evidence,
4 argumentative therefore.

5 THE WITNESS: And also it -- that's
6 a legal -- I don't know the answer, and that's
7 a -- I think that's a legal question that I'm not
8 sure that I would answer.

9 BY MR. FLEMING:

10 Q. Well, are you stating that Section
11 10.8 was violated because Ace acquired Federal,
12 or because Ace acquired Chubb & Son?

13 **A. Ace acquired Chubb & Son by**
14 **acquiring Federal.**

15 Q. So was there any increased use
16 following the merger by Chubb & Son?

17 **A. I haven't addressed that issue.**

18 Q. You don't know --

19 **A. During the period after -- between**
20 **the merger and the termination is what you're**
21 **asking about?**

22 Q. At any time.

23 **A. There was unlicensed -- there**
24 **was -- Mr. McCarter -- actually there was use**
25 **that violated the territory restriction in the**

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<p>1 contract, which would have been unlicensed use.</p> <p>2 I'm not sure whether that falls under the</p> <p>3 definition of increased use.</p> <p>4 I'm unaware of -- unaware of</p> <p>5 increased use during the period from the end of</p> <p>6 January until the termination. There may have</p> <p>7 been, but if so I'm not aware of it.</p> <p>8 Q. On page 15 of your report you quote</p> <p>9 Landy as saying "Companies may want the right to</p> <p>10 terminate the software license in an unwanted</p> <p>11 change of control situation," right?</p> <p>12 A. Yes.</p> <p>13 Q. What are some scenarios where</p> <p>14 withholding consent to an assignment would be</p> <p>15 reasonable?</p> <p>16 A. Well, certainly all of the</p> <p>17 circumstances in this case would be -- would be</p> <p>18 such circumstances. But in cases where the new</p> <p>19 licensee was far -- was a different company</p> <p>20 exposed the licensor to different risks, and</p> <p>21 where the new licensee was far larger and had</p> <p>22 much greater use of the software, I believe</p> <p>23 either Landy or Classen states that that's</p> <p>24 something that software companies would</p> <p>25 customarily want to protect themselves in that</p>	<p>1 all inclusive, but there could be a change of</p> <p>2 ownership of a company where one had to be bought</p> <p>3 out all the stock of the other -- where there was</p> <p>4 one stockholder, he sold all or part of his</p> <p>5 holdings to another stockholder, the company was</p> <p>6 essentially the same company before and after, in</p> <p>7 that case it might, depending on other</p> <p>8 circumstances.</p> <p>9 But conceivably there would be</p> <p>10 circumstances in such a situation where it wasn't</p> <p>11 one company acquiring another, but just the</p> <p>12 change of ownership of an existing system,</p> <p>13 conceivably under some circumstances that would</p> <p>14 be a -- similar to the case of my death and</p> <p>15 passing my license on to my wife.</p> <p>16 BY MR. FLEMING:</p> <p>17 Q. What if there was a change in</p> <p>18 control where it was contemplated that there</p> <p>19 would be no increased use of Blaze?</p> <p>20 MR. HINDERAKER: But what?</p> <p>21 Objection; vague.</p> <p>22 THE WITNESS: It would depend on</p> <p>23 circumstances. And certainly as -- I believe</p> <p>24 that in those cases and as described by Landy and</p> <p>25 Classen, those cases, there would have to be some</p>
<p>1 event by requiring consent before allowing such</p> <p>2 assignment.</p> <p>3 Q. What are scenarios where</p> <p>4 withholding consent to an assignment would be</p> <p>5 unreasonable?</p> <p>6 MR. HINDERAKER: Object to the</p> <p>7 hypothetical question.</p> <p>8 THE WITNESS: I haven't -- I</p> <p>9 haven't tried to address that issue.</p> <p>10 BY MR. FLEMING:</p> <p>11 Q. I'm just asking you, give me some</p> <p>12 scenarios where withholding consent would be</p> <p>13 unreasonable.</p> <p>14 Is your answer you just don't know,</p> <p>15 you can't think of any circumstances?</p> <p>16 A. Let's say software was licensed to</p> <p>17 me and I were to die and my wife were to assume</p> <p>18 the license for that software, I would think</p> <p>19 withholding consent for such a transfer would not</p> <p>20 be reasonable.</p> <p>21 Q. Can you think of any other</p> <p>22 scenarios, or just your death?</p> <p>23 MR. HINDERAKER: Same objection</p> <p>24 with respect to hypotheticals.</p> <p>25 THE WITNESS: I'm not meaning to be</p>	<p>1 discussion of consent.</p> <p>2 In most of those cases there would</p> <p>3 be consent, but there would have to be discussion</p> <p>4 and some negotiation as to what was required for</p> <p>5 such consent.</p> <p>6 BY MR. FLEMING:</p> <p>7 Q. Well, why would there have to be a</p> <p>8 discussion about what consideration would be</p> <p>9 given under those circumstances if it wasn't</p> <p>10 contemplated that there would be increased use of</p> <p>11 the license?</p> <p>12 MR. HINDERAKER: Objection;</p> <p>13 question is hypothetical, and the question</p> <p>14 assumes facts within the hypothetical.</p> <p>15 MR. FLEMING: Go ahead.</p> <p>16 THE WITNESS: Contemplation that</p> <p>17 there would be no increased use isn't the same as</p> <p>18 there being no increased use, number one.</p> <p>19 Number two, if the contract</p> <p>20 specifically said that such a transfer required</p> <p>21 consent regardless of increased use, then there</p> <p>22 would be good reason to require consent and some</p> <p>23 consideration.</p> <p>24 BY MR. FLEMING:</p> <p>25 Q. You say on page 18 of your report</p>

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1 Advisor? I think you've -- that's the question
2 I'd like an answer to.
3 **A. When I'm referring to similar to**
4 Blaze Advisor, what I'm referring to is business
5 application software. And in some cases that
6 would be special purpose business applications
7 such as Blaze Advisor. In other cases it would
8 be general purpose business application software
9 such as, for instance, Oracle Financials or
10 PeopleSoft ERP software. PeopleSoft now being a
11 part of Oracle. Or Lawson software or others.
12 And I'm familiar -- and so all of those would be
13 business application software like Blaze Advisor.

14 Q. Okay.

15 **A. And that's what I'm familiar with.**

16 Q. Would you agree that database
17 software is an example of system software, the
18 category of software that includes operating
19 systems which is entirely different from
20 application software like Blaze that perform
21 business functions?

22 **A. Yes.**

23 Q. Okay. What are some other examples
24 of application software in the market today?

25 **A. Oracle Financials, SAP-1, Lawson's** Page 237

1 **ARP software, SAP's R/3. Boy, I mean, Microsoft**
2 Dynamics. I think there are four -- at least
3 three different Microsoft Dynamics' products.
4 There are software applications for different
5 kinds of professional businesses and so forth.

6 The ones I've given you are brand
7 name products that you might have heard of.

8 Q. What is your understanding as to
9 who are the main competitors to Blaze software in
10 the marketplace?

11 **A. Yeah, I looked at the main**
12 competitors that were listed in the Forester
13 report. And as we sit here today, I'm not
14 recalling them off the top of my head.

15 Q. On page 26 of your report you state
16 that commercial software pricing methods are very
17 fluid.

18 Are you saying it's impossible to
19 quantify the market rate for a license in this
20 situation?

21 **A. I don't understand your question.**

22 What do you mean by the market rate
23 for a license?

24 Q. What do you mean when you say that

25 commercial software pricing methods are very Page 238

1 fluid?

2 **A. I mean that for different**

3 business -- business software and different
4 software licensors, pricing can be very --
5 everything from very rigid as it would for
6 off-the-shelf consumer software or off-the-shelf
7 software that gets installed by businesses with
8 no implementation or customization, on up to very
9 variable by company and licensor ranging from
10 hundreds of dollars to millions of dollars with
11 discounts ranging from nothing to a substantial
12 portion of list price.

13 And you'd have to look at

14 individual -- individual software -- markets for

15 individual software applications, ERP

16 applications. General purpose ERP applications

17 might be one thing, special purpose -- and by ERP

18 I mean general purpose business software. The

19 term ERP means enterprise resource planning. The

20 name doesn't connote what it actually is. It's

21 a -- comes out historically.

22 Q. So did you --

23 **A. So it just depends on the software.**

24 But by very fluid I mean the amount of the

25 license varies by type of software, and the level Page 239

1 of discounting varies both by type of software
2 and by market.

3 Q. Did you attempt to determine the
4 fair market value of the Blaze software license
5 as of 2016 or presently?

6 **A. I have not attempted to do that,**
7 no.

8 Q. How would you go about doing that?

9 **A. The fair market value. The fair**
10 market value is what FICO sells it for to its
11 customers. So you'd have to look at the way --
12 what price FICO has determined to sell its
13 software licenses at, and whether it's able to
14 sell substantial numbers of licenses at those
15 prices.

16 Q. But you have not provided an
17 opinion as to the fair market value of the Blaze
18 license either as of 2016 or presently, correct?

19 **A. Correct.**

20 MR. FLEMING: All right. That's
21 all I have.

22 MR. HINDERAKER: Okay. I guess I
23 have one question.

24 EXAMINATION

25 BY MR. HINDERAKER: Page 240

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1 Q. Mr. Hilliard, has your testimony
2 ever been limited in a court, arbitration, or any
3 other forum for reasons that you were -- for
4 reasons that you were not qualified as an expert
5 to provide the opinion?

6 A. No.

7 MR. HINDERAKER: We will read and
8 sign.

9 MR. FLEMING: All right.

10 THE VIDEO OPERATOR: This concludes
11 the deposition. The time is 3:55 p.m.

12 (Whereupon, the videotaped
13 deposition was terminated at 3:55 p.m.)

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